

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY SABAUGH,

Plaintiff/Counterdefendant-
Appellant,

v

STEVEN H. RIGA,

Defendant/Counterplaintiff-
Appellee,

and

MORTONS OF CHICAGO AND DETROIT,
BRIAN FORD, and MERRILL LYNCH, INC.,

Defendants.

UNPUBLISHED

June 12, 2003

No. 233687

Wayne Circuit Court

LC No. 98-822778-CK

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the order awarding defendant attorney fees and costs as a sanction for civil and criminal contempt. Plaintiff also challenges the trial court's temporary restraining order and the order holding her in civil and criminal contempt. We affirm.

Plaintiff brought this circuit court action against defendant, who was her former live-in boyfriend as well as her stockbroker, alleging breach of fiduciary duty, conversion, negligence, assault and battery, and other claims. During the proceedings, the trial court dismissed several of plaintiff's claims. Plaintiff thereafter filed a notice of filing for arbitration before the National Association of Securities Dealers (NASD), moved to compel arbitration, and requested a stay of her circuit court action.¹ The trial court subsequently entered an order denying plaintiff's motion to compel arbitration and her request to stay the circuit court action, concluding that she "has

¹ Plaintiff executed a client agreement with Merrill Lynch when defendant became her stockbroker in 1991. The agreement indicated that plaintiff had a right to arbitrate any disputes before an NASD arbitration panel.

elected to have her claims resolved in circuit court and has waived her right to NASD Arbitration.” Despite the court’s order, plaintiff commenced and continued the NASD proceedings. The trial court ultimately entered an order permanently enjoining plaintiff from proceeding with the NASD arbitration and holding her in criminal and civil contempt. The trial court also awarded defendant costs and attorney fees. The court’s March 9, 2001, order provided, in pertinent part:

1. [Plaintiff] is hereby held in *criminal contempt* of Court for failing to comply with the terms of the Court’s Order dated January 11, 2000 for the reasons stated by the Court on the record. [Plaintiff] shall pay to [defendant] the costs and attorneys fees incurred by him in both the NASD arbitration and the Wayne County Circuit Court after July 17, 2000 through the date of this Order.

2. [Plaintiff] is hereby held in civil contempt of Court for failing to comply with the terms of the Court’s Order dated January 11, 2000 for the reasons stated by the Court on the record. [Plaintiff] shall pay to [defendant] the costs and attorneys fees incurred by him having to defend himself in the NASD arbitration against the claims asserted by [plaintiff] in her Statement of Claim filed with the NASD on or about October 29, 1999 from the date of this Order going forward[.] [Emphasis added.]

On appeal, plaintiff argues that the trial court impermissibly awarded defendant attorney fees for “criminal contempt” because such an award is compensatory relief that is limited to civil contempt proceedings.

This Court reviews a trial court’s decision to award attorney fees for an abuse of discretion. *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998). “An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias.” *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183 (2000). To the extent that plaintiff argues that the trial court’s award of compensatory relief for criminal contempt was legally impermissible, that issue is a question of law that is reviewed de novo. See *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000).

Circuit courts are authorized to punish certain misconduct, including a party’s violation of the court’s lawful orders. MCL 600.1701(g); *Kirby v Michigan High School Athletic Ass’n*, 459 Mich 23, 32 n 8; 585 NW2d 290 (1998); *In re Contempt of Auto Club Ins Ass’n*, 243 Mich App 697, 708-709; 624 NW2d 443 (2000). MCL 600.1721 provides:

If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury.

Section 1721 clearly authorizes a court to order the payment of a sum to indemnify a party who has sustained a loss as a direct result of the other party’s contempt. “Such a loss may include attorney fees incurred as a result of the contemptuous conduct.” *Plumbers and*

Pipefitters Local Union No 190 v Wolff, 141 Mich App 815, 818; 369 NW2d 237 (1985). See also *In re Contempt of Calcutt*, 184 Mich App 749, 758; 458 NW2d 919 (1990), and *Burnett v Burnett*, 152 Mich App 157, 161; 393 NW2d 562 (1986). In *In re Contempt of Dougherty*, 429 Mich 81, 97-98; 413 NW2d 392 (1987), our Supreme Court clarified that, in addition to the contempt sanction of criminal punishment, “there are two types of civil contempt sanctions, coercive and *compensatory*.” (Emphasis added.) The Court indicated that § 1721 codified the compensatory sanction. *Id.*

More recently, in *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499-500; 608 NW2d 105 (2000), this Court stated that compensatory relief is available only as a remedy to redress civil contempt:

Three sanctions are available to a court to remedy contemptuous behavior: (1) criminal punishment to vindicate the court’s authority, (2) coercion, to force compliance with a court order, and (3) *compensatory relief for the complainant. The latter two are civil contempt sanctions.* MCL 600.1721; MSA 27A.1721 codified the compensatory civil contempt sanction[.] [Emphasis added; citations omitted.]

Accordingly, plaintiff correctly argues that an award of attorney fees, which is compensatory relief, is a civil contempt sanction. However, it is necessary to analyze whether, despite the court’s characterization of the award of attorney fees as a “criminal contempt” sanction, it was actually a civil contempt sanction and thereby permissible.

Proceedings regarding contempt can be civil or criminal, and the *character and purpose of the punishment* often serve to distinguish the two. *Auto Club Ins Ass’n, supra* at 711; *In re Contempt of Rochlin*, 186 Mich App 639, 644; 465 NW2d 388 (1990). “Proceedings for civil contempt are instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce those rights and administer the remedies to which the court has found the parties are entitled.” *United Stationers Supply Co, supra* at 500. If the sanction for the contemptuous conduct is remedial and for the benefit of the complainant, the proceedings are civil. *Rochlin, supra*.

Conversely, criminal contempt “serves a very different purpose from civil contempt in that it punishes the contemnor for past conduct that affronts the court’s dignity.” *Auto Club Ins Ass’n, supra* at 713. See also *Burnett, supra*. If the sanction for contemptuous conduct is punitive to vindicate the authority of the court, the proceedings are criminal. *Dougherty, supra* at 93; *Rochlin, supra* at 643.

We conclude that, because of the nature and purpose of the sanction, the court’s sanction here was civil, as opposed to criminal. Indeed, the payment of defendant’s attorney fees incurred as a result of plaintiff’s violation of the court’s order was intended as compensatory relief to defray defendant’s actual losses as a result of plaintiff’s misconduct. In other words, the trial court’s order plainly evinces an intent to reimburse or compensate defendant. See *Rochlin, supra*. Therefore, the contempt sanction was civil, not criminal. See, e.g., *United Stationers Supply Co, supra* at 500-501. Accordingly, although the court mischaracterized the type of contempt sanction it imposed, it did not abuse its discretion by awarding defendant attorney fees incurred as a result of plaintiff’s contemptuous conduct.

Plaintiff also suggests that the contempt sanctions were impermissible to the extent that defendant was awarded attorney fees incurred as a result of having to defend against the NASD arbitration. Plaintiff claims that, pursuant to *Plumbers and Pipefitters Local Union No 190, supra*, the trial court “had authority to award fees incurred only in the proceedings held before it.” Initially, we note that plaintiff’s reliance on *Plumbers and Pipefitters Local Union No 190*, is misplaced, because that case is factually distinguishable from the instant case. See *id.* at 816-818. Moreover, in the instant case, plaintiff was held in contempt because she violated the court’s order prohibiting her from seeking NASD arbitration. As such, defendant’s attorney fees incurred as a result of having to defend himself in the NASD arbitration were not ancillary to the contempt proceedings, but “resulted directly from the contempt.” *Id.* at 818. As previously indicated, § 1721 clearly authorizes a court to order the payment of a sum to indemnify a party for losses sustained as a direct result of the contemptuous conduct, including attorney fees. See *id.*, *Calcutt, supra*, and *Burnett, supra*. Accordingly, the trial court did not abuse its discretion by ordering plaintiff to compensate defendant for his attorney fees incurred as a direct result of plaintiff’s contemptuous conduct.

We decline to address plaintiff’s remaining issues. In her remaining issues, plaintiff challenges the award of attorney fees on the basis that the court’s initial finding of contempt was erroneous. In doing so, plaintiff directly challenges the trial court’s temporary restraining order and order of contempt. However, this Court previously dismissed for lack of jurisdiction plaintiff’s claim of appeal as it applied to those orders. Plaintiff subsequently filed a delayed application for leave to appeal those orders, in which she raised the identical issues that she now raises here. This Court denied the application for “lack of merit in the grounds presented.”² Because the law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals as to that issue, plaintiff’s argument on these issues is without merit and the issues are not properly before this Court. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). We therefore decline to consider them.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Peter D. O’Connell

² This Court also denied plaintiff’s motion for rehearing. Plaintiff’s delayed application for leave to appeal this Court’s decision to the Supreme Court was also denied.